

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
VITAMINS ANTITRUST LITIGATION)

) Misc. No. 99-197 (TFH)
) MDL 1285

FILED

THIS DOCUMENT RELATES TO:)
Animal Science Products, Inc. v. Chinook)
Group, Ltd., et al.)

NOV 30 2001

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORIALIZING OPINION Re: Final Approval of UCB Chemicals Settlement

Pending before the Court is class plaintiffs' Motion pursuant to Fed. R. Civ. P. 23(e) and 54 for Final Approval of Settlement Between Class Plaintiffs and Defendant UCB Chemicals Corporation and for Entry of Final Judgment. Upon careful consideration of class plaintiffs' Motion, the representations made at the November 30, 2001 hearing on final approval, and the entire record herein, and in accordance with the Court's November 30, 2001 bench opinion, class plaintiffs' Motion for Final Approval and for Entry of Final Judgment is granted.

I. BACKGROUND

The proposed settlement is the third settlement regarding choline chloride arising from litigation surrounding a worldwide conspiracy or conspiracies to fix prices and allocate markets for the sale of bulk vitamins.¹ On July 25, 2001 the Court preliminarily approved the proposed settlement with UCB Chemicals and certified the settlement class. The UCB Settlement Class consists of all persons or entities who directly purchased Vitamin B4, also known as choline chloride, in the United States or for delivery in the United States from any of the Defendants or

¹The first settlement occurred on March 31, 2000, when the Court granted final approval to Class Plaintiffs' settlement regarding choline chloride with BASF ("BASF Settlement"). The second choline chloride settlement, which received final approval on July 17, 2001, was reached with the Akzo ("Akzo Settlement").

their co-conspirators from January 1, 1988 through December 31, 1998 (excluding all governmental entities, and defendants, their co-conspirators, and their respective subsidiaries and affiliates). The Settlement Agreement provides that UCB Chemicals Corporation will make a cash payment of \$9,000,000 to be available to the members of the UCB Settlement Class.

The Settlement Agreement also obligates UCB Chemicals Corporation to cooperate with Class Plaintiffs in their ongoing prosecution of this litigation against the remaining Defendants. In exchange, the UCB Settlement Class will dismiss all claims against UCB Chemicals Corporation and a defined group of Releasees. The release does not include any potential or current claims based upon purchases of vitamin products and choline chloride sold outside the United States or for delivery outside the United States, nor does it include claims based on indirect purchases of vitamins products, including choline chloride.

II. DISCUSSION

Approval of the proposed class action settlement lies within the discretion of this Court. United States v. District of Columbia, 933 F. Supp. 42, 67 (D.D.C. 1996). Fed. R. Civ. P. 23(e) provides that:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Fed. R. Civ. P. 23(e). The Rule 23 requirements are fully consistent with the long-standing judicial attitude favoring class action settlements. Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993). "The Court must eschew any rubber stamp approval . . . yet, at the same time, must stop short of the detailed and thorough investigation that it would undertake if it were actually

trying the case.” United States v. District of Columbia, 933 F. Supp. at 47. The exercise of this discretion, however, is constrained by the “principle of preference” favoring and encouraging settlements in appropriate cases. Pigford v. Glickman, 185 F.R.D. 82, 103 (D.D.C. 1999).

There is no single test in this Circuit for determining whether a proposed class action settlement should be approved under Rule 23(e). Pigford, 185 F.R.D. at 98. Generally, in determining whether settlement should be approved, courts consider whether the proposed settlement “is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are being served if the litigation is resolved by settlement rather than pursued.” Manual for Complex Litigation (Third), § 30.42 at 238 (1995). In making this determination, courts in this Circuit have examined the following factors: (a) whether the settlement is the result of arm’s length negotiations;² (b) the terms of the settlement in relation to the strength of plaintiffs’ case;³ (c) the status of the litigation at the time of settlement;⁴ (d) the reaction of the class;⁵ and, (e) the opinion of experienced counsel.⁶

²See Thomas v. Albright, 139 F.3d 227, 231-233 (D.C. Cir.), cert. denied, 525 U.S. 1016, 1033 (1998); Pigford, 185 F.R.D. at 99-101.

³See Thomas, 139 F.3d at 231; Pigford, 185 F.R.D. at 98.

⁴See In re National Student Marketing Litig., 68 F.R.D. 151, 155 (D.D.C. 1974); Osher v. SCA Realty I, 945 F. Supp. 298, 304 (D.D.C. 1996); Pray v. Lockheed Corp., 644 F. Supp. 1289, 1290 (D.D.C. 1986); see also Moore v. National Assoc. of Sec. Dealers, Inc., 762 F.2d 1093, 1106 (D.C. Cir. 1985).

⁵See Thomas, 139 F.3d at 231-33; In Re National Student Marketing Litig., 68 F.R.D. at 155; Osher, 945 F. Supp. at 304; Stewart v. Rubin, 948 F. Supp. 1077, 1087 (D.D.C. 1996), aff’d, 124 F.3d 1309 (D.C. Cir. 1997).

⁶See Stewart, 948 F. Supp. at 1087; McGinness v. Parness, 1989 WL 29817, at *1 (D.D.C. Mar. 22, 1989).

A. Arm's Length Negotiations

A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." Manual for Complex Litig., at § 30.42. According to plaintiffs' counsel, the UCB Chemicals Settlement Agreement was the "product of several months of extensive arm's length negotiations by experienced counsel, undertaken in good faith, and after substantial factual investigation and legal analysis." Pl's Mot. at 9. Clearly, this Settlement was negotiated by experienced antitrust and class action attorneys. Because there is nothing in the course of the negotiations or the face of the Settlement that "disclose[s] grounds to doubt its fairness," *id.* (citing Manual for Complex Litig., at § 30.41), the Court finds that the Settlement at issue was the result of arms' length negotiations and is thus presumptively fair, adequate and reasonable.

B. Terms of Settlement

This Settlement is similar to the previous choline chloride settlements in this litigation - it essentially mirrors the Akzo Settlement approved by this Court in July 2001. Under the terms of the Settlement Agreement, UCB Chemicals has paid \$9 million to settle the claims of the UCB Settlement Class. The settlement amount is significant because the Akzo defendants sold no choline chloride in the United States during the class period and members of the UCB Settlement Class are being compensated only for United States purchases or deliveries. This is settlement brings the value of settlements from choline chloride producers to a total of \$21.5 million, excluding interest, as this is the third choline chloride settlement in this litigation. Moreover, this is the largest settlement as the most recent settlement with Akzo yielded \$7.5 million, and the settlement with BASF totaled \$5 million. In fact, plaintiffs' counsel estimates that the actual

percentage recovery will be greater than the BASF settlement which resulted in payments equaling slightly more than 13 percent of a class member's purchases, thus, this Settlement is a significant benefit for the Class. In addition, the Settlement provides a meaningful guarantee of recovery to class members regardless of how the litigation against the remaining non-settling defendants is resolved, and also places a limitation on the defendants' liability.

The Settlement includes a Most Favored Nation Provision ("MFN Provision") which provides that Class Plaintiffs are to settle with other choline chloride defendants for an amount equal to or greater than the amount paid by UCB Chemicals. The provision does allow, however, Class Plaintiffs to settle for less if counsel for the Class Plaintiffs reasonably concluded that it would be unreasonable to continue litigation against other defendants in an effort to obtain a judgment or settlement greater than the amount paid by UCB Chemicals in the settlement. This provision is also a benefit to the settlement class.

Given the complexities of proof in antitrust cases, which is, perhaps, compounded here by the fact that the Settling Defendants did not participate in United States market, and, the ordinary risks, and delays inherent in complex antitrust litigation, the Settlement appears to provide a significant benefit to the Class. Defendants would also appear to benefit from an early and definite resolution to this dispute. Therefore, after weighing the possibilities of recovery and the risks and expenses of protracted litigation for both sides, the Court finds that the instant Settlement falls within the range of fair, adequate and reasonable settlements deserving of final approval.

C. Status of Litigation At Settlement

The Settlement is a significant benefit to the Class Plaintiffs, especially at this point in the

litigation. The Court recently ruled that UCB S.A., UCB Chemicals' parent company is subject to jurisdiction in Arkansas, California, Illinois, Indiana, Kansas, Minnesota, Missouri, Texas, and Virginia, but not the District of Columbia. See Memorandum Opinion and Order Re: UCB Motion to Dismiss, October 30, 2001. As a result of this decision, Class Plaintiffs' would have had to go through the lengthy process of re-filing in a court where UCB S.A. is subject to jurisdiction.

The Agreement is a result of more than three years of investigation and litigation. Class Plaintiffs uncovered the alleged conduct among bulk vitamin producers before the federal cooperation agreements became public and before any defendants confessed to their wrongdoing. Although the litigation has been ongoing for several years, the instant litigation is still in the discovery stage. Trial is currently scheduled for September 2002. Therefore, this Settlement does not come too early to be suspicious nor too late to be a waste of resources. It is in fact at a desirable point in the litigation for the parties to reach an agreement and to resolve these issues without further delay, expense, and litigation.

D. Reaction of Class to Settlement

One of the factors generally considered in determining the reasonableness of a settlement is the reaction of the class. Thomas, 139 F.3d at 231-33; In re National Student Marketing Litig., 68 F.R.D. at 155; Osher, 945 F. Supp. at 304; Stewart, 948 F. Supp. at 1057. In this case, more than 6200 notices of this Court's preliminary approval of the Settlement were sent to class members.⁷ As of October 28, 2001, the Court appointed deadline for written requests for

⁷Copies of the Notice of Proposed Settlement with UCB Chemicals and Hearing Thereon were mailed on August 13, 2001 by first class mail to all potential members of the Settlement Class to the extent that they could be identified from the database of customers created by the

exclusion and for objections – no objections had been received by class plaintiffs or by the Court. See Fazzone Aff. at ¶ 6. In addition, no objections were raised at the November 30, 2001 hearing on final approval of this Settlement. There have been 274 exclusion requests, most of which come from companies who also opted out of the BASF choline settlement and who are pursuing their own lawsuits. Therefore, there has been no substantive opposition to this Settlement.

E. Opinion of Experienced Counsel

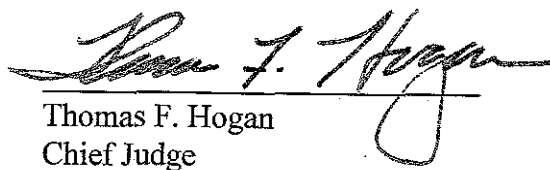
Counsel in this case are among the best and most experience antitrust litigators in the country. Consequently, their opinion that this Settlement is fair, adequate, and reasonable is deserving of this Court's consideration. Although the Court will not defer blindly to the views of counsel with regard to the adequacy of a settlement, it must consider that the Settlement was reached after several months of arms' length negotiation by experienced counsel and that both counsel and all parties involved view it as a reasonable settlement.

Claims Administrator. Summary notices of the proposed Settlement were also published in The Wall Street Journal on August 21 and August 27, 2001, in Feedstuffs on August 27, 2001, and in Chemical Market Reporter on August 27, 2001. The Notices alerted class members to the time and place of the Court's hearing on final approval of this Settlement and directed them to additional sources of information, including access to the documents on the Court's website. See id. at ¶ 4. Accordingly, the Court is satisfied that adequate notice of the Settlement and hearing have been provided.

III. CONCLUSION

After considering all of the above mentioned factors, the Court finds that this Settlement is adequate, fair and reasonable. Accordingly, class plaintiffs' Motion for Final Approval of the proposed Settlement Agreement is granted and final judgment dismissing with prejudice the UCB Chemicals defendants is entered. An order will accompany this Memorializing Opinion.

November 30, 2001


Thomas F. Hogan
Chief Judge